NIK OMAR NIK MAN

v.

BANK SIMPANAN NASIONAL

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
ARIFIN ZAKARIA FCJ
NIK HASHIM FCJ
[CIVIL APPEAL NO: K-01-2004]
1 SEPTEMBER 2005

LABOUR LAW: *Employment - Termination of service - Whether appellant a probationary or confirmed employee - Whether termination valid and proper - Whether a colourable exercise of power - Whether appellant ought to be reinstated*

This was an appeal by the appellant against the decision of the High Court finding that the termination of the appellant's services by the respondent was valid and proper. The respondent, through a letter dated 22 June 1978, had made the appellant an offer of employment; the appellant accepted and commenced work on 1 July 1978. Under the terms of the letter of offer, the appellant was to be placed on probation for the period of one to three years, during which the appellant's services may at any time be terminated. The terms also stated that the post to which the appellant would be appointed to in the event he accepted the offer was a "permanent and pensionable" post. The appellant was given pensionable status with effect from 1 December 1988 by a letter dated 28 October 1988 from the Pension Division of the Public Services Department. From the record, the appellant appeared to have intermittently absented himself from the office; he claimed that it was due to some treatment he was undergoing because of health reasons. The respondent terminated the appellant *via* a letter dated 11 August 1998, the termination to take effect retrospectively from 8 February 1998. The learned judicial commissioner decided the case upon the narrow question of whether the termination of the appellant's services with payment of one month's salary *in lieu* of notice was valid under paras. 47.1 and 48.2 of the "Terma dan Syarat-syarat Perkhidmatan Bank Simpanan Nasional" ("Bab A") in favour of the respondent. Hence, the present appeal by the appellant.

Held (allowing the appeal)
Per Arifin Zakaria FCJ delivering the judgment of the court:

[1] The respondent had acted under paras. 47.1 and 48.2 of Bab A and the terms and conditions of service found in para. 2(c) and (d) of the letter of offer dated 22 June 1978. This was clearly stated in its letter of termination dated 11 August 1998. However, para. 2(c) and (d) had no application to the appellant since he was no longer an officer on probation. As the appellant had been placed under a permanent and pensionable scheme, the purported termination could only have been made pursuant to para. 48.2 of Bab A, which did not purport to give the respondent an absolute right to terminate the services of its employees. (pp 71 h & 72 f-g)

[2] In the termination letter, it was stated that the decision to terminate the services of the appellant was made by the "management". The question was what was meant by the "management" *ie*, whether it was the Board of the bank or any other body or person given authority by the Board. Therefore, it was open to doubt whether the "management" had the authority to terminate the services of the appellant under para. 48.2 of Bab A. The burden lay on the respondent to satisfy the court that the so-called "management" had the authority to do what it had purported to do. The respondent had failed to do as such. (p 74 d)

[3] It was not open to the respondent to terminate the services of the appellant simply on the premise that his services were no longer required without giving reasons for it. The appellant, having been confirmed in his post and placed under the pensionable scheme, could not be terminated by due notice under para. 48.2 of Bab A. (pp 74 h & 75 a-c)

[4] In this instance, what had happened was a colourable exercise of power. The respondent had intended to dismiss the appellant because of his prolonged absence from office. However, instead of proceeding under disciplinary procedures, the respondent chose what it believed to be a less cumbersome route by resorting to para. 48.2 of Bab A. In the circumstances, it was incumbent upon this court to intervene in the present case in order to prevent the injustice that had been afflicted upon the appellant. (p 75 e-g)

[Appellant to be reinstated to his original post and given all benefits accruing to his post in accordance with terms and conditions of service.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi yang memutuskan bahawa penamatan kerja perayu oleh responden adalah sah dan teratur. Responden, melalui surat bertarikh 22 Jun 1978, telah menawarkan kerja kepada perayu; perayu menerima tawaran dan mula bekerja pada 1 Julai 1978. Berdasarkan terma surat tawaran, perayu diletakkan di bawah percubaan bagi tempoh satu hingga tiga tahun, dan dalam tempoh tersebut perkhidmatan perayu boleh ditamatkan pada bila-bila masa. Terma juga menyatakan bahawa jawatan yang perayu akan dilantik sekiranya beliau menerima tawaran adalah jawatan "tetap dan berpencen". Perayu kemudian diberikan status berpencen mulai 1 Disember 1988 melalui surat bertarikh 28 Oktober 1988 oleh Bahagian Pencen, Jabatan Perkhidmatan Awam. Rekod perayu menunjukkan bahawa beliau sering tidak hadir di pejabat; perayu bagaimanapun memberi alasan kesihatan dengan mendakwa bahawa ianya disebabkan oleh penyakitnya yang memerlukan rawatan. Responden menamatkan perkhidmatan perayu melalui surat bertarikh 11 Ogos 1998, dengan penamatan berkuatkuasa secara retrospektif bermula 8 Februari 1998. Yang arif pesuruhjaya kehakiman memutuskan kes dengan berpihak kepada responden, berdasarkan persoalan sempit sama ada penamatan perkhidmatan perayu dengan bayaran sebulan gaji sebagai ganti notis sah di bawah perenggan-perenggan 47.1 dan 48.2 "Terma dan Syarat-Syarat Perkhidmatan Bank Simpanan Nasional" ("Bab A"). Perayu telah merayu.

Diputuskan (membenarkan rayuan)
Oleh Arifin Zakaria HMP menyampaikan penghakiman mahkamah:

[1] Responden bertindak di bawah perenggan 47.1 dan 48.2 Bab A dan syarat-syarat perkhidmatan seperti yang terdapat di per. 2(c) dan (d) surat tawaran bertarikh 22 Jun 1978. Ini jelas dari surat penamatan perkhidmatan bertarikh 11 Ogos 1998. Bagaimanapun, per. 2(c) dan (d) tidak terpakai kepada perayu kerana beliau bukan lagi seorang pegawai di bawah percubaan. Oleh kerana perayu sudah ditempatkan di bawah skim tetap dan berpencen, penamatan kerjanya hanya boleh dibuat di bawah per. 48.2 Bab A, yang tidak memberikan hak mutlak kepada responden untuk menamatkan perkhidmatan pekerja-pekerjanya.

[2] Dalam surat penamatan perkhidmatan, ianya dinyatakan bahawa keputusan untuk menamatkan perkhidmatan adalah dibuat oleh pihak "pengurusan". Persoalannya adalah apakah yang dimaksudkan dengan "pengurusan" iaitu, adakah ia Lembaga bank atau pun badan atau orang lain yang diberi kuasa oleh Lembaga. Dengan demikian, terdapat kesangsian sama ada "pengurusan" mempunyai kuasa untuk menamatkan perkhidmatan perayu di bawah per. 48.2 Bab A. Beban adalah atas responden untuk memuaskan

mahkamah bahawa apa yang dipanggil "pengurusan" itu mempunyai kuasa untuk membuat apa yang telah dilakukannya. Ini gagal dibuktikan oleh responden.

[3] Responden tidak boleh menamatkan perkhidmatan perayu semata-mata atas alasan bahawa perkhidmatannya tidak lagi diperlukan tanpa memberikan sebab-sebab baginya. Perayu, setelah disahkan dalam jawatannya dan ditempatkan di bawah skim tetap dan berpencen, tidak boleh ditamatkan perkhidmatannya dengan cara notis melalui per. 48.2 Bab A.

[4] Apa yang berlaku di sini adalah suatu pelaksanaan kuasa yang tercemar. Responden berhasrat untuk membuang kerja perayu disebabkan oleh ketidakhadirannya yang berterusan di pejabat. Bagaimanapun, responden tidak meneruskannya melalui prodising disiplin, sebagaimana sepatutnya, tetapi memilih jalan yang difikirnya lebih ringkas iaitu melalui per. 48.2 Bab A. Dalam halkeadaan demikian, menjadi kewajipan mahkamah ini untuk campur tangan bagi mengekang ketidak-adilan yang dialami oleh perayu.

Perayu hendaklah diberikan jawatannya semula dan diberikan segala manfaat berdasarkan terma dan syarat perkhidmatannya.]

Case(s) referred to:

Chartered Bank, Bombay v. The Chartered Bank Employees' Union AIR [1960] SC 919 ***(foll)***
Dr A Dutt v. Assunta Hospital [1981] 1 MLJ 304 ***(foll)***
Gnanasundram v. Government of Malaysia [1971] 1 MLJ 208 ***(refd)***
Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 2 MLJ 129 ***(foll)***
Ratnam Bikal Seevaratnam v. Government of State of Pahang [1982] 1 MLJ 16 ***(refd)***

Legislation referred to:

Bank Simpanan Nasional Act 1974, ss. 3, 6

For the appellant - Darshan Singh Khaira; M/s Darshan Singh & Co
For the respondent - Mohamad Sofee Razak; M/s Noor Zihan Zain & Co

[Appeal from High Court, Alor Setar; Civil Suit No: 21-06-1999]

Reported by Suresh Nathan

JUDGMENT

Arifin Zakaria FCJ:

The Background

This is an appeal against the decision of the learned High Court Judge in dismissing the appellant/plaintiff's claim. After hearing submissions of counsel for the parties we allowed the appeal with costs and ordered that the appellant be reinstated to his original post and entitled to all the benefits according to the terms and conditions of service. We now give our reasons for our decisions.

From the notes of proceeding it would appear that when the case was called up on 7 December 2003 before the High Court, the parties applied to learned Judicial Commissioner (JC) for the matter to be decided by way of written submissions and thus dispensing with the calling of witnesses. The learned JC allowed the application and the matter proceeded on that premise. Upon perusal of the Appeal Record before us we found that documents were filed by both parties, which are contained in Part C of the Appeal Record. It is not clear whether the parties had agreed to these documents or otherwise. However, since these documents are contained in the Appeal Record accordingly we will treat them as agreed documents both as to their authenticity and content. There was no agreed facts filed by the parties. Therefore, the facts as found by the learned JC must have been derived from either the pleadings or from the documents before the court.

The Facts

The facts as may be gleaned from the pleadings and documents before the court are briefly as follows. The offer of employment by the respondent to the appellant was made through the letter of 22 June 1978. The appellant accepted the offer and commenced work on 1 July 1978. The letter of offer is found at pp. 83 and 84 of the Appeal Record. Clause 2(c) of the letter of offer reads:

> (c) Tuan/puan akan berkhidmat di dalam percubaan selama 1 hingga 3 tahun. Sekiranya tuan/puan tidak disahkan di dalam jawatan apabila tempuh percubaan tuan/puan tamat, perkhidmatan tuan/puan mungkin ditamatkan.

This means that the appellant was required to be placed on probation for the period of one to three years and during that period the appellant's service may at any time be terminated. Clause 3 of the same letter, however, reads:

> 3. Jawatan yang ditawarkan ini adalah tetap dan berpencen.

Literally it means that the post offered is "permanent and pensionable". In other words the post to which the appellant will be appointed to in the event he accepted the offer is a "permanent and pensionable" post. By letter of the Pension Division of Public Services Department dated 28 October 1988 (p. 86 of Appeal Record) the appellant was given the pensionable status with effect from 1 December 1988. By that we take it to mean that the appellant had been confirmed in his employment and had been placed on a permanent and pensionable scheme.

Then came the "Surat Tawaran Saraan Bank Simpanan Nasional (SSBSN) kepada Kakitangan Tetap Bank Simpanan Nasional" dated 31 March 1994. (See pp. 88-91 Appeal Record.) It is pertinent to note that this offer was addressed to permanent employees of the respondent. The appellant accepted SSBSN offered by the respondent.

From the record it would appear that the appellant had, for some reason, on and off absented himself from office. He claimed that he was absent for health reasons for which he was undergoing some treatment. This problem started in 1997 until his service was terminated by the respondent through its letter dated 11 August 1998. The termination was to take effect restropectively from 8 February 1998.

The Issues And Findings

The learned JC decided the case on the narrow question of whether the termination of service of the appellant *vide* letter dated 11 August 1998 with effect from 8 February 1998 with payment of one month's salary *in lieu* of notice was valid under paras. 47.1 and 48.2 of the Terms and Conditions of Service.

Relying on the authorities of *Gnanasundram v. Government of Malaysia* [1971] 1 MLJ 208 and *Ratnam Bikal Seevaratnam v. Government of State of Pahang* [1982] 1 MLJ 16 he held that the notice of termination was valid and proper and hence dismissed the appellant's claim with costs. With regret we could not agree with the conclusion arrived at by the learned JC for the following reasons.

The respondent in the present case acted under paras. 47.1 and 48.2, Terma Dan Syarat-Syarat Perkhidmatan Bank Simpanan Nasional ("Bab A") and the terms and conditions of service found in paras. 2(c) and 2(d) of the letter of offer dated 22 June 1978. This is clearly stated in its letter of termination dated 11 August 1998. From our reading of paras. 2(c) and 2(d), they clearly have no application to the appellant here since the appellant is no longer a probation officer. The appellant, as we stated earlier, had been placed on permanent and pensionable establishment as long ago as 28 October 1988. (Please see

the letter of Jabatan Perkhidmatan Awam Malaysia, Bahagian Pencen at p. 86 of the Appeal Record). We are, therefore, left to consider paras. 47.1 and 48.2 of Bab A in relation to the purported termination. Paragraphs 47 and 48 of Bab A read as follows:

47. Kuasa Menamatkan Perkhidmatan

47.1 Bank boleh menamatkan perkhidmatan seseorang kakitangan mengikut syarat-syarat perlantikannnya.

48. Notis Menamatkan Perkhidmatan

48.1 Kakitangan dalam percubaan dan sementara boleh ditamatkan perkhidmatannya dengan diberi tempoh tiga (3) bulan notis jika mereka telah berkhidmat lebih satu tahun dan satu (1) bulan notis jika mereka berkhidmat kurang daripada 1 tahun atau pun dibayar sebulan gaji sebagai ganti notis yang cukup, dengan tidak diberi sebarang sebab.

48.2 Atas kepentingan perkhidmatan kakitangan yang telah disahkan dalam jawatan juga boleh ditamatkan perkhidmatannya dengan diberi tiga bulan notis atau dibayar sebulan gaji, kecuali kakitangan yang ditamatkan perkhidmatanya atas sebab-sebab tindakan tatatertib.

Paragraph 47.1 confers upon the respondent the right to terminate the service of any employee. However, this is subject to one important condition that is, it must be in accordance with the terms of his employment. The appellant's terms and conditions of employment, *inter alia*, are contained in the letter of offer dated 22 June 1978. It is not in dispute that on the date of the purported termination the appellant had already been placed on a permanent and pensionable scheme in accordance with para. 3 of the letter of offer. For that reason the purported termination could only have been made pursuant to para. 48.2 and not para. 48.1 of Bab A as the latter only applies to probationary and temporary employees. Let us then consider para. 48.2 in its proper context. The relevant part of which provides that "in the interest of service" an employee who had been confirmed in service may also be terminated from service by giving three months notice or *in lieu* thereof be paid one month's salary. From our reading of this paragraph it does not purport to give the respondent an absolute right to terminate the service of its employee, for it is subject to one important consideration that is, the termination may only be made "in the interest of service". It is far from clear what is meant by "in the interest of service" as used in para. 48.2 of Bab A. It is not anywhere defined in Bab A.

It is appropriate at this juncture to consider the termination notice of 11 August 1998, the relevant part of which is set out below:

PENAMATAN PERKHIDMATAN SEBAGAI BURUH AM (KUP) (D01-5) DI BANK SIMPANAN NASIONAL

Dimaklumkan bahawa pihak Pengurusan Bank telah menimbangkan semula kedudukan tuan sebagai Buruh Am (KUP) di Bank Simpanan Nasional. Dukacita dimaklumkan, oleh kerana perkhidmatan tuan dengan Bank ini **tidak lagi diperlukan,** maka pihak Pengurusan telah memutuskan untuk menamatkan perkhidmatan tuan sebagai Buruh Am (KUP) mulai 8.2.1998 berdasarkan peruntukan di para 47.1 dan 48.2 Bab A, Terma Dan Syarat-syarat Perkhdimatan Bank Simpanan Nasional serta syarat-syarat di Para 2(c) dan 2(d) dalam Surat Tawaran sebagai Buruh Am BN/IP/SULIT 54/(38) bertarikh 22 Jun 1978 yang memperuntukkan,

47.1 Bank boleh menamatkan perkhidmatan seseorang kakitangan mengikut syarat-syarat perlantikannya.

47.2 Atas kepentingan perkhidmatan kakitangan yang telah disahkan dalam jawatan juga boleh ditamatkan perkhidmatannya dengan diberi tiga bulan notis atau dibayar sebulan gaji, kecuali kakitangan yang ditamatkan perkhidmatannya atas sebab-sebab tindakan tatatertib.

2(c) Tuan/puan akan berkhidmat di dalam percubaan selama 1 tahun hingga 3 tahun. Sekiranya tuan/puan tidak disahkan di dalam jawatan apabila tempoh percubaan tuan/puan tamat, perkhidmatan tuan/puan mungkin ditamatkan.

2(d) Semasa tuan/puan berada di dalam percubaan, tuan/puan boleh diberhentikan dari jawatan bila-bila masa selepas diberi sebulan notis ataupun sebagai ganti notis dibayar sebulan gaji dengan tidak diberi sebarang sebab. Tuan/puan berhak meletakkan jawatan dengan memberi sebulan notis ataupun membayar balik sebulan gaji. Setelah tuan-puan disahkan dalam jawatan, notis yang dikehendaki bagi kedua-dua pihak ialah tiga bulan atau sebagai ganti notis membayar sebulan gaji.

2. Penamatan perkhidmatan tuan adalah berkuatkuasa mulai dari 8.2.1998 dengan dibayar sebulan gaji sebagai ganti notis yang cukup.

3. Sehubungan itu, tuan dikehendaki menyerahkan buku rawatan perubatan, kad pekerja dan lain-lain harta Bank (jika ada) kepada Pengurus Negeri Kedah dengan kadar segera.

4. Bersama-sama ini disertakan Borang Lampiran 'E' untuk tuan tandatangani dan sila kembalikan ke Unit Personel dengan seberapa segera untuk tindakan selanjutnya. (emphasis added)

It is important to note that the termination was made on the ground that the service of the appellant is "no longer required" ("tidak lagi diperlukan") and for that reason "the Management" ("pihak Pengurusan") decided to terminate his service under paras. 47.1 and 48.2 of Bab A and under paras. 2(c) and 2(d) of the letter of offer dated 22 June 1978. As we stated earlier paras. 2(c) and 2(d) of the letter of offer are clearly not applicable to the appellant's case and we do not propose to say any more on this. As for para. 47.1 of Bab A it is clear that the power to terminate the service of any employee lies with the bank. Therefore, it is the bank and the bank alone that could exercise that power. By the word "bank" it means the "Bank Simpanan Nasional" established under s. 3 of the Bank Simpanan Nasional Act 1974 ("the Act"). Naturally the bank, being a statutory body operated through the "Board" established under s. 6 of the Act. In the termination letter it is stated that the decision to terminate the service of the appellant was made by "the management". The question is what is meant by "the management" here, is it the Board of the bank or any other body or person given authority by the Board. Therefore, it is open to doubt whether "the management" here has the authority to terminate the service of the appellant under para. 48.2 of Bab A. The burden lies on the respondent to satisfy the court that the so-called "management" has the authority to do what it purported to do. We found the respondent failed to do this.

The other point that comes to the forefront for our consideration is the reason given for the termination of the service of the appellant. It is stated that his service is no longer required by the respondent. The respondent did not say why his service is no longer required by the respondent. The question is: does para. 48.2 of Bab A confer on the respondent an unfettered power to terminate the service of the appellant without assigning any reason thereof. The answer to this may be found in what was stated by Chang Min Tat FJ in *Dr. A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304 at p. 314:

> The High Court judgment in Goon Kwee Phoy was itself overruled by another division of the Federal Court for reasons to be stated and the award of the Industrial Court of compensation to a workman who had had his contract of employment terminated by due notice, but without just cause or excuse, restored. This court had therefore held that the so-called "termination simpliciter" which is not grounded on any just cause or excuse would enable the Industrial Court to award compensation if it would not order reinstatement.

We do not think it is open to the respondent to terminate the service of the appellant simply on the premise that his service is no longer required without giving reasons for it. It should be realised that what the respondent purported to do here would have dire consequences on the appellant. He will not only

lose his employment but he would also be deprived of his pension benefits. As was said by Raja Azlan Shah (CJ) (Malaya) (as HRH then was) in *Goon Kwee Phoy v. J. & P. Coats (M) Bhd.* [1981] 2 MLJ 129 at p. 136:

> We do not see any material difference between a termination of contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and result must be the same where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse.

We are conscious that the above statement was made in the context of industrial relation law, but we think it is all the more important here for the court to make such an enquiry since the appellant at the material time had already been placed on a permanent and pensionable scheme. Having been confirmed in the post and emplaced on the pensionable scheme the appellant's service could not, in our view, be terminated by due notice under para. 48.2 of Bab A.

It is also our view that what happened in this case is a colourable exercise of the power of termination under para. 48.2 of Bab A, as a cloak for dismissal. What the respondent in fact intended to do here was to dismiss the appellant from the service of the respondent because of his prolonged absence from office. However, instead of proceeding under the disciplinary procedure the respondent chose what it believed to be a less cumbersome procedure by resorting to para. 48.2 of Bab A. However, as was held in the Indian case of *Chartered Bank, Bombay v. the Chartered Bank Employees' Union* AIR [1960] SC 919 "… if the termination of service was a colourable exercise of power or as a result of victimization or unfair labour practice the (Indian) Industrial Tribunal would have the jurisdiction to intervene and set aside such termination, and to go behind the termination order to see whether it was a mere camouflage for a dismissal for misconduct without following the prescribed procedure." Even though the above observation was made in the context of industrial relation law it is, in our view, equally applicable to the present case. In the circumstances, it is thus incumbent upon us to intervene in the present case in order to prevent the injustice that had been inflicted on the appellant.

On the authorities relied by the learned JC, with respect, we find they are of no relevance to the present case. As the facts disclosed in *Gnanasundram v. Government of Malaysia (supra),* he was appointed as a temporary officer in the Road Transport Department and the court held that he was terminated in accordance with the terms of the offer of appointment. Similarly in the case of *Ratnam Bikal Seevaratnam v. Government of State of Pahang (supra)*

the appellant there was a temporary officer engaged on a month to month basis, therefore, her service was rightfully terminated in accordance with the terms and conditions of service.

Conclusion

For the above reasons we allowed the appeal herein with costs both here and in the High Court and ordered that the appellant be reinstated to his original post and be given all the benefits accruing to the post in accordance with the terms and conditions of his service. The deposit to be refunded to the appellant.